SUBJECT INDEX

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CASES.

STATUTES

IN THE

Supreme Court of the United States

October Term, 1948
No. 204

CITY OF VERNON, a municipal corporation, its defendant officers and employees,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Respondent opposes the granting of a Writ of Certiorari herein upon the ground that no federal question is involved. The contentions made and the replies thereto are similar to those in the companion case of *City of Culver City v. State of California,* No. 205. However, because the material has been presented in a different manner in the petitions, it was deemed advisable by respondent to file separate briefs. As to items 1, 3, 4 and 5, the arguments are identical. Item 2 is essentially the same.

Petitioners' Claim of Jurisdiction.

Petitioners claim jurisdiction under section 237(b) of the Judicial Code, 28 U. S. C. A. 344(b). The petitioners assert that the District Court of Appeal of California has decided a federal question of substance not heretofore determined by this court (Supreme Court Rule 38(5)(a)); and that the trial court and the District Court of Appeal have denied the petitioners a right, privilege and immunity which petitioners set up under the due process clause of the Fourteenth Amendment of the United States Constitution.

Under a decree the petitioners and numerous other cities, including the City of Los Angeles, and their respective officers, were required to abate a nuisance caused by the discharge of sewage into Santa Monica Bay. Under California law cities were permitted to make contracts with other cities and governmental instrumentalities to carry out their functions. Pursuant to these laws contracts were entered into for the discharge of sewage of the various cities through a trunk line, "treatment" plant and submarine tube in Santa Monica Bay.

It is only under the authority of these various laws relating to the joint powers of cities that the petitioners and other cities are authorized to make such contracts. One city may act on behalf of all others. (*City of Oakland v. Williams,* 15 Cal. 2d 542, 103 P. 2d 168.) The petitioners have asserted that they are exempt from all liability for the creation of the nuisance by reason of their

contracts with the City of Los Angeles. The District Court of Appeal stated:

> "This is a proceeding initiated by the people of the State of California on behalf of the state itself, and on behalf of the State Department of Public Health, as well as other state agencies, against all named defendants, to abate a public nuisance. Therefore, the court rightfully refrained from passing upon any of the rights, obligations or liabilities affecting the various defendants by reason of their contractual relations with each other, and left those matters open for future adjudication in a proper proceeding. Although the aforesaid contracts concerned the disposal of sewage, the court would not be justified in this action to adjudicate the rights existing between the various appellants by reason of their contracts one with the other. In so far as the judgment herein is concerned, if any of the appellants have any rights against the city of Los Angeles, or *vice versa,* by reason of any existing contract, such rights have been preserved and may be enforced in a proper action. All of appellants' property and rights were preserved to them and the judgment in the instant action does not impair or violate any of their constitutional rights."

Thus it will be seen that the petitioners have not been deprived of any right, privilege or immunity whatever, whether claimed under the due process clause or otherwise, but on the contrary all the rights, privileges, immunities as well as obligations of all parties to the various contracts, including the City of Los Angeles, have been

preserved, and have not been affected in any way whatever.

It is claimed by petitioners that the District Court of Appeal has decided a federal question of substance not heretofore determined by this court. This claim is made on the ground that the decision in this case is in conflict with *Carmichael v. City of Texarkana, et al.* (1902), 94 Fed. 561 (District Court), and 116 Fed. 845 (C. C. A. 8th Circuit). It will be pointed out later that there is no conflict between the *Carmichael* case and the instant case.

The Question Presented.

The respondent disagrees with the statement of question presented by the petitioner. The question should read:

Where a state law authorizes municipalities to contract together to operate a joint enterprise, and where one may act on behalf of all in carrying out such joint enterprise, and where the state has sued (first) for the common law abatement of a nuisance caused by such enterprise, being for sewage disposal, and (second) for the enforcement of state laws relating to sewage disposal, may a city complain that its property is taken without due process of law where the state courts hold that such contracts are not a defense to the maintenance of the nuisance and failure to comply with the statutes, but hold that if there are any rights, obligations, liabilities or privileges by reason of such contracts between the cities themselves that such rights may be litigated in independent proceedings between the respective contracting parties.

ARGUMENT.

Summary of Argument.

1. No federal question can be raised under the due process clause for there has been no actual impairment of right or property.

2. A municipality cannot urge that a state has violated the due process clause.

3. When parties have been fully heard in the regular course of judicial proceedings, the alleged deprivation of property by judicial decision does not ordinarily raise a federal question.

4. No federal question is involved when the judgment of the state court rests on adequate and independent state grounds.

5. A city cannot escape a primary liability by making a contract.

6. The court ordered the nuisance abated and ordered treatment works to be constructed, but did not dictate or prescribe the means or facilities, or that any particular plant be built by the petitioners.

7. The contention that the statutes of California requiring a permit from the State Board of Public Health for the treatment or discharge of sewage impairs the obligation of contracts has not been raised previously in this proceeding; furthermore, such contention cannot be raised by a municipality against the state.

8. The determination of the question of joint liability for maintaining a public nuisance is not a federal question of substance under rule 38(5)(a) of the rules of the Supreme Court.

I.

No Federal Question Can Be Raised Under the Due Process Clause for There Has Been No Impairment of Right or Property.

It is the contention of the petitioners that the State of California by a judicial decision has deprived the petitioners of property without due process of law. The holding of the court has been set out hereinabove. It has been previously held by this court that if the action of the State court did not affect the right or property, but left it as it was before the litigation, the judgment did not deprive the appellant of any right, privilege or immunities secured by the Constitution or laws of the United States.

Abbott v. Tacoma Bank of Commerce (1899), 175 U. S. 409, 20 S. Ct. 153, 44 L. Ed. 217.

II.

A Municipality Cannot Urge That a State Has Violated the Due Process Clause.

It is established in this court that a municipal subdivision of the state is not a person within the protection of the due process clause, and cannot urge that the laws of the state violate the due process clause.

Twin Falls County, State of Idaho v. Henderson (1939), 305 U. S. 568, 59 S. Ct. 149, 83 L. Ed. 358;

Trenton v. New Jersey (1923), 262 U. S. 182, 43 S. Ct. 534, 67 L. Ed. 937, 29 A. L. R. 1471.

In the latter case this court pointed out that in this respect there was no distinction between governmental and proprietary rights.

The power of the state and its agencies over municipal corporations within its territory is not restrained by the provisions of the Fourteenth Amendment.

Risty et al. v. Chicago R. I. & P. Railway Co., 270 U. S. 378, 390, 46 S. Ct. 236, 70 L. Ed. 641.

III.

When Parties Have Been Fully Heard in the Regular Course of Judicial Proceedings, the Alleged Deprivation of Property by Judicial Decision Does Not Ordinarily Raise a Federal Question.

This court has accepted jurisdiction in numerous cases involving the due process clause based upon action of a state through its court or judicial officers. Such cases involve extraordinary situations such as irregularity in judicial proceedings. The usual rule is that alleged impairment of any right without due process of law by judicial decision does not raise a federal question.

Cross Lake Shooting & Fishing Club v. Louisiana (1912), 224 U. S. 632, 32 S. Ct. 577, 579-580, 56 L. Ed. 924;

Kryger v. Wilson (1916), 242 U. S. 171, 37 S. Ct. 34, 61 L. Ed. 229.

The Constitution does not guarantee that decisions of the state court shall be free from error, or require that their pronouncement shall be consistent.

Worcester County Trust Co. v. Riley (1937), 302 U. S. 292, 58 S. Ct. 185, 82 L. Ed. 268.

When parties have been fully heard in the regular course of judicial proceedings, an alleged erroneous decision of the State court does not deprive the unsuccessful party of

his property without due process of law, within the Fourteenth Amendment of the Constitution.

Central Land Co. v. Laitley (1895), 195 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91.

It is not conceded that there is any error in the decision of the State court.

IV.

No Federal Question Is Involved When the Judgment of the State Court Rests on Adequate and Independent State Grounds.

It has been pointed out that there was no actual impairment of right or property by the decision of the State court. The decision of the State court was not based on any federal question at all, but on the contrary was based on adequate and independent state grounds. The decision of the State court was based upon two grounds: first, upon the specific statutory provisions of the state law relating to the discharge and treatment of sewage, and second, upon the abatement of a public nuisance. No federal question was passed upon nor had to be passed upon to decide the case. It has been repeatedly determined that to give this court jurisdiction it must appear affirmatively, not only that the federal question was presented for decision, but also that its decision was necessary to a determination of the cause, and that it was actually decided, or that judgment could not have been given without deciding it.

Wilson v. Cook, 327 U. S. 474, 480, 66 S. Ct. 663,

V.

A City Cannot Escape a Primary Liability by Making a Contract.

The principal contention of the petitioners is that they should have been held to have escaped liability for the discharge of their sewage by reason of their contracts with the City of Los Angeles. The City of Los Angeles, they maintain, was obligated at its own cost and expense to provide the necessary work for sewage disposal and to maintain such work in proper condition. The petitioners further contend that when those disposal works were out of repair, were worn out, and had become inadequate, the responsibility was solely that of the City of Los Angeles. The screening plant (sometimes called a treatment plant), and submarine tube was adequate for the population it served only for a few years after it was constructed and placed in operation in 1925. This system now serves approximately three times that number of people, but the screening plant has not been enlarged. If the responsibility were solely that of the City of Los Angeles, as the petitioners contend, then the Superior Court and the District Court of Appeal erred in holding the petitioners and other cities jointly responsible for the creation of a public nuisance in the operation of the present sewage disposal system. The record, however, shows that the petitioners and all other cities were jointly engaged in a common enterprise. The fact that the screening plant and submarine tube were under the sole control of the City of Los Angeles is not relevant to the issue. It has been established in

City of Oakland v. Williams, 15 Cal. 2d 542, 103 P. 2d 168, that cities conducting joint enterprises under the joint powers act may provide that the employees of one of them shall serve for all and that normal governmental processes of the city so selected shall prevail for the management of the enterprise. The petitioners have justified the legality of their contracts with the City of Los Angeles. Indeed, such contracts were valid only by virtue of these statutes. (Statutes of 1909, p. 67; Deering's Gen. Laws, Act 5992; Joint Powers Act, Statutes of 1921, p. 542; Deering's Gen. Laws, Act 1801.)[1] Whatever powers the City of Vernon and the City of Culver City would have within their boundaries, they have no general authority to act outside their limits in the absence of the statute.

Since the only law which would permit the disposition of sewage by Los Angeles in conjunction with other agencies was the Joint Powers Act, the court was justified in deciding that the parties were engaged in a joint enterprise, and hence are jointly liable for its result.

It therefore follows that the City of Vernon and the City of Culver City and the other cities which were joined as defendants in this proceeding were engaged as a matter of law as well as a matter of fact in a joint enterprise and are therefore jointly liable. The cases of *Carmichael v. City of Texarkana,* and other similar cases, under such circumstances do not support the contention made by the

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[1]Pertinent portions of these statutes are printed in the Supplement to the Petition in case No. 205, pages 41-48.

petitioners. The City of Texarkana owed a duty to its inhabitants; but the City of Los Angeles owed no duty to the City of Vernon nor the City of Culver City to dispose of such cities' sewage.

VI.

The Court Ordered the Nuisance Abated and Ordered Treatment Works to Be Constructed, but Did Not Dictate or Prescribe the Means or Facilities, or That Any Particular Plant Be Built by the Petitioners.

The petitioners strenuously contend that the State court erred in giving the petitioners the privilege of joining with the City of Los Angeles in the construction of a new treatment plant which had been approved by the State Board of Public Health. In lieu thereof the petitioners could build their own treatment plant, providing such treatment plant disposed of sewage in a safe and sanitary manner without creating a nuisance and was approved by the State Board of Public Health as required by state law. It appears that the privilege of joining with the City of Los Angeles would be more economical for each city, including the City of Vernon and the City of Culver City than for each city to build its own separate treatment and disposal plant. It is submitted that the petitioners are not required to accept this privilege. The fact that a privilege was made available to them certainly does not invalidate the decision.

VII.

The Contention That the Statutes of California Requiring a Permit From the State Board of Health for the Treatment or Discharge of Sewage Impairs the Obligation of Contracts Has Not Been Previously Raised in This Proceeding; Furthermore, Such Contention Cannot Be Raised by a Municipality Against the State.

The petitioners, for the first time in this proceeding, contend that the statutes of California requiring a permit for the treatment and discharge of sewage impairs the obligation of contracts.[2] (Petition and Brief pp. 32-36.) It is well established that a claim not asserted in the State court will not be considered on certiorari to this court.

> *Wilson v. Cook*, 327 U. S. 474, 483, 66 S. Ct. 663, 90 L. Ed. 793.

Aside from the fact that this point has not been raised in the State court, it has been held by this court numerous times that the regulation by the state of cities is not invalid as impairing the obligation of contracts.

> *City of Pawhuska v. Pawhuska Oil & Gas Co. et al.*, 250 U. S. 394, 39 S. Ct. 526, 63 L. Ed. 1054.

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[2]Pertinent portions of the statute are printed in the supplement to the petition in case No. 205, at pages 51-53.

VIII.

The Determination of the Question of Joint Liability for Maintaining a Public Nuisance Is Not a Federal Question of Substance Under Rule 38(5)(a) of the Rules of the Supreme Court.

The petitioners contend that a federal question of substance under Rule 38(5)(a) of the Rules of the Supreme Court is created by the decision of the District Court of Appeal in its apparent disagreement with the case of *Carmichael v. City of Texarkana, et al.* (1902), 94 Fed. 561 (Dist. Ct.), 116 Fed. 845 (Circuit Ct.). An examination of the decision of the District Court of Appeal shows that it is not in fact in conflict with the *Carmichael* case. Even if it were in conflict with the *Carmichael* case, a federal question of substance has not been raised. The jurisdiction of the federal court in the *Carmichael* case was based upon a diversity of citizenship pursuant to 28 U. S. C. A. 71, and was not based upon an actual dispute between the parties as to the meaning of some constitutional provision, or law or treaty of the United States or upon the materiality of the construction of that provision, or law or treaty to a determination of the cause. It is submitted that the mere lack of uniformity between a decision of a State court and a decision of a Circuit Court of Appeals of another circuit on non-federal grounds does not give rise to a federal question of substance under the rules of the Supreme Court.

Conclusion.

We submit that no constitutional question is involved in this proceeding; that the rights of the petitioners in any contracts with the City of Los Angeles have been carefully preserved, not only as to the petitioners but also as to the City of Los Angeles; that a municipality as an agent of the state cannot, against the state, raise a question under the due process clause; and finally that no federal question of substance under the provisions of Rule 38(5)(a) is shown in the petition for the Writ. The respondent respectfully requests that the Writ be denied.

Respectfully submitted,

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